

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA)	
<u>ex rel.</u> EDMUND G. BROWN, ATTORNEY)	
GENERAL OF THE STATE OF CALIFORNIA,)	No. 06-2654 SC
)	
Plaintiff,)	
)	ORDER GRANTING
v.)	DEFENDANTS' MOTION
)	FOR SUMMARY JUDGMENT
)	AS IT RELATES TO
NATIONAL HIGHWAY AND TRAFFIC)	DOCUMENTS 8, 9, AND
SAFETY ADMINISTRATION; DEPARTMENT)	<u>31</u>
OF TRANSPORTATION; and OFFICE OF)	
MANAGEMENT AND BUDGET,)	
)	
Defendants.)	
_____)	

I. INTRODUCTION

Before the Court is the unresolved portion of the Motion for Summary Judgment brought by Defendants National Highway and Traffic Safety Administration ("NHTSA"), Department of Transportation ("DOT"), and the Office of Management and Budget ("OMB") (together "Defendants"). See Docket Nos. 33, 53.

On May 8, 2007, the Court denied Plaintiff's Motion for Summary Judgment, granted Defendants' Motion for Summary Judgment in part, reserved judgment as to Documents 8, 9, and 31, and

1 ordered OMB to submit those Documents to the Court for in camera
2 inspection. See Docket No. 53. OMB submitted the documents to
3 the Court on May 22, 2007. See Docket No. 54. For the following
4 reasons, after reviewing the three documents, the Court hereby
5 GRANTS Defendants' Motion as it relates to Documents 8, 9, and 31.

6 7 **II. LEGAL STANDARD**

8 Summary judgment is proper "if the pleadings, depositions,
9 answers to interrogatories, and admissions on file, together with
10 the affidavits, if any, show that there is no genuine issue as to
11 any material fact and that the moving party is entitled to
12 judgment as a matter of law." Fed. R. Civ. P. 56(c).

13 14 **III. DISCUSSION**

15 **A. The Deliberative Process Exemption**

16 OMB withheld Documents 8, 9, and 31 based on exemption 5 of
17 the Freedom of Information Act ("FOIA"), which allows an agency to
18 withhold "inter-agency or intra-agency memorandums or letters
19 which would not be available by law to a party other than an
20 agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

21 The burden of proving that specific documents are exempt is
22 on OMB. See 5 U.S.C. § 552(a)(4)(B); Maricopa Audubon Soc'y. v.
23 U.S. Forest Serv., 108 F.3d 1089, 1092 (9th Cir. 1997). The Ninth
24 Circuit has stated:

25 To qualify for exemption 5 under the "deliberative
26 process" privilege, a document must be both (1)
27 "predecisional" or "antecedent to the adoption of agency
28 policy" and (2) "deliberative," meaning "it must
actually be related to the process by which policies are

1 formulated."

2 Nat'l Wildlife Fed'n v. U.S. Forest Serv., 861 F.2d 1114, 1117
3 (9th Cir. 1988). Where, as here, the government agency fails to
4 sustain its burden through affidavits, the district court may
5 order in camera inspection of the documents in question. See Lion
6 Raisins, Inc. v. U.S. Dept. of Agric., 354 F.3d 1072, 1079 (9th
7 Cir. 2004); Maricopa Audubon Soc'y, 108 F.3d at 1093 n.2.

8 B. Documents 8 and 9

9 Documents 8 and 9 are exempt from production. Both documents
10 contain email messages authored by OMB staff members, discussing
11 draft regulations. See Kim Decl. Ex. A at 16. Both documents are
12 predecisional. They were prepared prior to the final publication
13 of the Corporate Average Fuel Economy ("CAFE") rule in the Federal
14 Register on April 6, 2006. See id.; Morall Decl. ¶ 4. Further,
15 both are deliberative, in that they discuss changes to the
16 proposed regulations. As indicated in Defendants' Vaughn index,
17 Document 9 includes Document 8, which includes Documents 3-7.¹
18 See Kim Decl. Ex. A at 15-16. Plaintiffs do not challenge that
19 Documents 3-7 fall within exemption 5. See P's Mot. for Summary
20 J.; P's Opp'n to D's Mot. for Summary J. (Docket Nos. 41, 47).
21 The Court therefore focuses its inquiry on the final communication
22 in each document. Each is a message from one OMB staff member to
23 another, discussing the status of the draft regulations.
24 Disclosure of the contents of these documents could expose OMB's

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26 ¹ Documents 3-9 on the Vaughn index appear to be a chain of
27 email messages, each of which includes the text of the previous
28 messages in the reply.

1 decision-making process "in such a way as to discourage candid
2 discussion within the agency." See Maricopa Audubon Soc'y, 108
3 F.3d at 1094-95 (quoting Assembly of the State of Cal. v. U.S.
4 Dep't of Commerce, 968 F.2d 916 (9th Cir. 1992)).

5 C. Document 31

6 Document 31 is also protected by exemption 5. This document
7 is an August 25, 2005 email message sent by an OMB staff member
8 discussing the reactions of various stakeholders to the proposed
9 regulation. See Kim Decl. Ex. A at 25. As it was prepared prior
10 to the entry of the final CAFE regulation, it is predecisional.
11 See Morall Decl., ¶ 4. Document 31 is also deliberative. Based
12 on the description of Document 31 in Defendants' Vaughn index,
13 Plaintiff suggests that the document contains only "factual
14 information conveyed to agency staff" and therefore cannot qualify
15 for the exemption. See P's Opp'n at 7. Although the description
16 on the Vaughn index lacks detail, this is excusable, as Defendants
17 are not required to disclose on that index the very information
18 they are trying to protect. See, e.g., Wolfe v. Dep't of Health &
19 Human Servs., 839 F.2d 768, 771 n.3 (D.C. Cir. 1988)(en banc);
20 Maricopa Audubon Soc'y, 108 F.3d at 1093 ("Indeed, we doubt the
21 agency could have introduced further proof without revealing the
22 actual contents of the withheld materials."). The discussion of
23 stakeholder reactions in Document 31 includes opinions about the
24 significance of the reactions, opinions about what stakeholders
25 might do or say, and what effect those reactions may have on the
26 pending draft regulation. Disclosing this information would
27 almost certainly expose OMB's decision-making process, which
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1 exemption 5 is meant to protect. See Maricopa Audubon Soc'y, 108
2 F.3d at 1094-95.

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4 **IV. CONCLUSION**

5 For the foregoing reasons, the Court GRANTS Defendants'
6 Motion for Summary Judgment as it relates to Document Nos. 8, 9,
7 and 31. The parties shall bear their own costs.

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9 IT IS SO ORDERED.

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11 Dated: June 12, 2007

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UNITED STATES DISTRICT JUDGE
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